FOR ARGUMENT

Supreme Court, U.S.
FILED
NOV 5
MICHAEL RODAK, JR., CLERK

No. 75-6297

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

KENNETH S. GELLER,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitution and statutory provisions involved	2
Statement	5
Summary of argument	13
Argument:	
The exclusion of an unwed father in relation to his illegitimate child from the definitions of "child" and "parent" in Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952 is constitutional	19
A. The formulation of policies regarding the admission or exclusion of aliens from the United States is a basic characteristic of sovereignty and is entrusted by the Constitution exclusively to the political branches of government	19
B. The exclusion of illegitimate children in relation to their natural fathers is not reviewable because Section 101(b)(1)(D) reflects an unambiguous congressional intent to withhold special immigration preferences from appellants	24
C. Even if immigration policy determinations by the legislative and executive branches may be reviewed in the courts, Section 101(b) must be upheld because it has a rational basis and furthers valid objectives of the immigration laws	34
Conclusion	47

CITATIONS

Cases:

	Page
Aalund v. *Marshall*, 461 F. 2d 710	30
Almeida-Sanchez v. *United States*, 413 U.S. 266	23
Boutilier v. *Immigration and Naturalization Service*, 387 U.S. 118	20, 21, 22, 23
Brownell v. *Tom We Shung*, 352 U.S. 180	11
Bugajewitz v. *Adams*, 228 U.S. 585	23
Burrafato v. *United States Department of State*, 523 F. 2d 554, certiorari denied, 424 U.S. 910	11, 30
Cervantes v. *Immigration and Naturalization Service*, 510 F.2d 89	30
Chinese Exclusion Case, The, 130 U.S. 581	20, 21, 22, 32
Cleveland Board of Education v. *LaFleur*, 414 U.S. 632	43
Dunn v. *Immigration and Naturalization Service*, 499 F. 2d 856, certiorari denied, 419 U.S. 1106	21
Faustino v. *Immigration and Naturalization Service*, 432 F. 2d 429, certiorari denied, 401 U.S. 921	8, 30
Flemming v. *Nestor*, 363 U.S. 603	18, 21, 35
Fok Yung Yo v. *United States*, 185 U.S. 296	23
Fong Yue Ting v. *United States*, 149 U.S. 698	21, 22
Galvan v. *Press*, 347 U.S. 522	22, 23, 24
Geduldig v. *Aiello*, 417 U.S. 484	47
Gomez v. *Perez*, 409 U.S. 535	44
Hampton v. *Mow Sun Wong*, No. 73–1596, decided June 1, 1976	24, 33, 35
Harisiades v. *Shaughnessy*, 342 U.S. 580	15, 19, 21, 23, 30, 33, 34
Hines v. *Davidowitz*, 312 U.S. 52	20, 23
Immigration and Naturalization Service v. *Errico*, 385 U.S. 214	36
Japanese Immigrant Case, The, 189 U.S. 86	23
Jimenez v. *Weinberger*, 417 U.S. 628	43, 44
Kahn v. *Shevin*, 416 U.S. 351	35
Karnuth v. *United States*, 279 U.S. 231	20
Keller v. *United States*, 213 U.S. 138	23
Kleindienst v. *Mandel*, 408 U.S. 753	19, 22, 23, 28, 29
Lem Moon Sing v. *United States*, 158 U.S. 538	21, 22
Low Wah Suey v. *Backus*, 225 U.S. 460	23
Loza-Bedoya v. *Immigration and Naturalization Service*, 410 F. 2d 343	11

Cases—Continued

	Page
Li Sing v. *United States*, 180 U.S. 486	22–23
Mahler v. *Eby*, 264 U.S. 32	23
Massachusetts Board of Retirement v. *Murgia*, No. 74–1044, decided June 25, 1976	17–18
Mathews v. *Diaz*, No. 73–1046, decided June 1, 1976	24, 35
Mathews v. *Lucas*, No. 75–88, decided June 29, 1976	35, 40, 43, 44
Matter of A—, 5 I. & N. Dec. 272, reversed 5 I. & N. Dec. 283	26
Matter of Amado and Monteiro, 13 I. & N. Dec. 179	38
Matter of F—, 7 I. & N. Dec. 448	26
Matter of M—, 5 I. & N. Dec. 120	26, 27
Matter of Soares, 12 I. & N. 653	38
Matter of Stultz, Interim Decision #2401, decided June 30, 1975	38
Mendez v. *Major*, 340 F. 2d 128	31
Mourning v. *Family Publications Service Inc.*, 411 U.S. 356	43
Nazareno v. *Attorney General*, 512 F. 2d 936, certiorari denied, 423 U.S. 832	21, 45
Ng Fung Ho v. *White*, 259 U.S. 276	23
Nishimura Ekiu v. *United States*, 142 U.S. 651	19, 22
Noel v. *Chapman*, 508 F. 2d 1023, certiorari denied, 423 U.S. 834	21, 30
Oceanic Navigation Co. v. *Stranahan*, 214 U.S. 320	20, 23
Perdido v. *Immigration and Naturalization Service*, 420 F. 2d 1179	8, 30–31
Reid v. *Immigration and Naturalization Service*, 420 U.S. 619	30
Richardson v. *Belcher*, 404 U.S. 78	35
Rivera de Gomez v. *Kissinger*, 534 F. 2d 518, certiorari denied, No. 76–5043, October 18, 1976	11
Robles v. *Immigration and Naturalization Service*, 485 F. 2d 100	30
Rogers v. *Bellei*, 401 U.S. 815	40
Shaughnessy v. *Mezei*, 345 U.S. 206	21, 23
Silverman v. *Rogers*, 437 F. 2d 102, certiorari denied, 402 U.S. 983	30
Stanley v. *Illinois*, 405 U.S. 645	44
Swartz v. *Rogers*, 254 F. 2d 338, certiorari denied, 357 U.S. 928	31

Cases—Continued Page
Tiaco v. *Forbes*, 228 U.S. 549 23
Turner v. *Department of Employment Security*, 423 U.S. 44 43
United States Department of Agriculture v. *Moreno*, 413 U.S. 528 43
United States Department of Agriculture v. *Murry*, 413 U.S. 508 43–44
United States v. *Brignoni-Ponce*, 422 U.S. 873 23
United States v. *Ju Toy*, 198 U.S. 253 23
United States ex rel. Hintopoulos v. *Shaughnessy*, 353 U.S. 72 30
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 ..... 23, 30
United States ex rel. London v. *Phelps*, 22 F. 2d 228, certiorari denied, 276 U.S. 630 11
United States ex rel. Turner v. *Williams*, 194 U.S. 279 23
United States ex rel. Ulrich v. *Kellogg*, 30 F. 2d 984, certiorari denied, 279 U.S. 868 11
United States ex rel. Volpe v. *Smith*, 289 U.S. 422 23
Vlandis v. *Kline*, 412 U.S. 441 44
Weinberger v. *Salfi*, 422 U.S. 749 ..... 35, 42, 43, 44, 45
Weinberger v. *Wiesenfeld*, 420 U.S. 636 43
Wong Wing v. *United States*, 163 U.S. 228 22
Zakonaite v. *Wolf*, 226 U.S. 272 23
Constitution, treaties, and statutes:
United States Constitution:
Article I, Section 9, Clause 1 20
First Amendment 10, 29
Fourth Amendment 23
Fifth Amendment 2, 10, 14, 35
Ninth Amendment 10, 31, 33
Jay Treaty of 1794, Article III, 8 Stat. 116, 117 20
Constitution of the Intergovernmental Committee for European Migration, 6 U.S.T. 603, 604 (1955) 20
Act of October 3, 1965, Section 21(e), 79 Stat. 921 13
Convention between the United States of America and other American Republics regarding the status of aliens, Article I, 46 Stat. 2753 20
Immigration Act of 1924, Section 4(a), 43 Stat. 153 25

Constitution, treaties, and statements—Continued
Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. (and Supp. V) 1101, *et seq.*: Page
Section 101, 8 U.S.C. 1101, *et seq* 5, 13, 19, 38
Section 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A) 13
Section 101(b), 8 U.S.C. 1101(b) ..... *passim*
Section 101(b)(1), 8 U.S.C. 1101(b)(1) 2, 6, 10, 27
Section 101(b)(1)(A), 8 U.S.C. 1101(b)(1)(A) 6, 37
Section 101(b)(1)(B), 8 U.S.C. 1101(b)(1)(B) 6, 38
Section 101(b)(1)(C), 8 U.S.C. 1101(b)(1)(C) 6, 37, 41
Section 101(b)(1)(D), 8 U.S.C. 1101(b)(1)(D) ..... *passim*
Section 101(b)(1)(E), 8 U.S.C. 1101(b)(1)(E) 6, 37
Section 101(b)(2), 8 U.S.C. 1101(b)(2) 2, 5, 6, 8, 19, 25, 38
Section 201, 8 U.S.C. 1151 13
Section 201(b), 8 U.S.C. 1151(b) 4, 6, 8
Section 202, 8 U.S.C. 1152 13
Section 203, 8 U.S.C. 1153 17
Section 203(a), 8 U.S.C. 1153(a) 46
Section 204(a), 8 U.S.C. 1154(a) 9
Section 212(a)(14), 8 U.S.C. 1182(a)(14) 4, 5, 6, 8, 13
Section 212(a)(28)(D), 8 U.S.C. 1182(a)(28)(D) 28
1 Stat. 103 40
47 Stat. 153 25
28 U.S.C. 2282 11
Jay Treaty of 1794, Article III, 8 Stat. 116, 117 20
Ala. Code., title 27, § 11 (Cum. Supp. 1973) 41
Alaska Stat. § 25.20.050 (1975) 41
Ariz. Rev. Stat. Ann. § 8–601 (Cum. Supp. 1975) 41
Cal. Civil Code § 7001 (West, Cum. Supp. 1976) 41
Del. Code Ann., title 13, § 1301 (1975) 41
Ind. Stat. Ann. § 29–1–2–7(b)(1) (1972) 41
La. Rev. Stat. Ann. § 9:391 (Cum. Supp. 1976) 41
Me. Rev. Stat. Ann., title 18, § 1003 (1965) 41
Mich. Stat. Ann. § 27.3178 (Cum. Supp. 1976) 41
Miss. Code Ann. § 93–17–1 (1972) 41
N.C. Gen. Stat. § 49–10 (Cum. Supp. 1975) 41

Constitution, treaties, and statements—Continued Page
N.D. Cent. Code § 14–17–01 (Cum. Supp. 1975) 41
Ohio Rev. Code Ann. § 2105.18 (Cum. Supp. 1975) 41
Okla. Stat. Ann., title 10 § 55 (1966) 41
S.C. Code § 15–1384 (1962) 41
S.D. Comp. Laws § 25–6–1 (1969) 41
Tenn. Code Ann. § 36–302 (Cum. Supp. 1975) 41
Tex. Fam. Code Ann. § 13.01 (1975) 41–42
Utah Code Ann. § 78–30–12 (1953) 42
Miscellaneous:
Bar, *International Law* (1883) 19
Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 19
Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 San Diego L. Rev. 34 (1975) 44
103 Cong. Rec. 14659 (1957) 27
103 Cong. Rec. 15489 (1957) 27
103 Cong. Rec. 15497 (1957) 36
103 Cong. Rec. 16307 (1957) 36
103 Cong. Rec. 16719 (1957) 36
Kansas, *U.S. Immigration Exclusion and Deportation* (2d ed. 1940) 26
Gordon and Rosenfield, *Immigration Law and Procedure* (1976) 11, 22, 46
H.R. Rep. No. 1199, 85th Cong., 1st Sess. (1957) 27, 35, 36
H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 36
Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2d Sess. (July 28, 1976) 44, 46, 47
Papers of James Madison (1840) 30
S. Rep. No. 1057, 85th Cong., 1st Sess. (1957) 27

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75–6297

RAMON MARTIN FIALLO, ET AL., APPELLANTS

v.

EDWARD H. LEVI, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the three-judge district court (A. 51–73) is reported at 406 F. Supp. 162.

JURISDICTION

The judgment of the three-judge district court (A. 74–75) was entered on December 1, 1975. A notice of appeal to this Court (A. 75–76) was filed on December 31, 1975, and the jurisdictional statement was filed on March 1, 1976. On June 7, 1976, this Court noted

probable jurisdiction (A. 77). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(b)(1)(D) and 1101(b)(2), violate due process of law by excluding the relationship between an illegitimate child and his or her natural father from the immigration preferences accorded by the Act to the "child" or "parent" of a United States citizen or lawful permanent resident alien.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Sections 101(b)(1) and 101(b)(2) of the Immigration and Nationality Act of 1952, 66 Stat. 171, as amended, 8 U.S.C. (and Supp. V) 1101(b)(1) and 1101(b)(2) provide:

> (1) The term "child" means an unmarried person under twenty-one years of age who is—
>
> (A) a legitimate child; or
>
> (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of the stepchild occurred; or
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> (E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: *Provided*, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.
>
> (F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse

jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: *Provided,* That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: *Provided further,* That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Sections 201(b) and 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1151(b) and 1182(a)(14), are set forth in the appendix to the brief of the appellants.[1]

[1] On October 20, 1976, Section 212(a)(14) was amended to read as follows, effective January 1, 1977 (Pub. L. 94-571, Section 5, 90 Stat. 2703):

"(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the

STATEMENT

1. The Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.*, grants special preference immigration status to aliens who qualify as the "children" or "parents" of United States citizens and lawful permanent residents, within the meaning of the Act. Aliens who satisfy the statutory definition of this parent-child relationship may be exempt from any applicable immigration quota or numerical limitations (Section 201(b) of the Act, 8 U.S.C. 1151(b)), and may secure an immigrant visa

Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to non-preference immigrant aliens described in section 203(a)(8)."

This amendment eliminates the exemption from labor certification previously available to "parents" of United States citizens and lawful permanent resident aliens, as that term is defined in section 101(b)(2) of the Act, 8 U.S.C. 1101(b)(2). Section 9(a) of Pub. L. 94-571 provides that the amendments made by that statute "shall not operate to affect the entitlement to immigrant status or the order of consideration for issuance of an immigrant visa of an alien entitled to a preference status, under section 203(a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act, on the basis of a petition filed with the Attorney General prior to such effective date."

without obtaining a labor certification (Section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14)).[2]

Section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), defines a "child" as an unmarried person under twenty-one years of age who meets certain specified criteria.[3] Included within this definition, and thus accorded a status that facilitates their entry into this country free from numerical limitations or labor certification requirements, are a legitimate or legitimated child,[4] a stepchild,[5] an adopted child,[6] and an illegitimate child seeking preference by virtue of his relationship to his natural mother.[7] The definition does not extend to an illegitimate child seeking preference by virtue of his relationship to his natural father. Similarly, the natural father of an illegitimate child

[2] The labor certification exemption has been repealed effective January 1, 1977. See note 1, *supra*.

[3] A person qualifies as a "parent" under Section 101(b)(2) of the Act, 8 U.S.C. 1101(b)(2), solely by virtue of his or her relationship to a "child."

[4] 8 U.S.C. 1101(b)(1)(A) and (C). The legitimation may occur either under the law of the child's residence or domicile or the father's residence or domicile but must take place "before the child reaches the age of eighteen years" and at a time when "the child is in the legal custody of the legitimating parent or parents." 8 U.S.C. 1101(b)(1)(C).

[5] 8 U.S.C. 1101(b)(1)(B). The child must not have "reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." *Ibid.*

[6] 8 U.S.C. 1101(b)(1)(E). The child must have been adopted before his fourteenth birthday and must thereafter have "been in the legal custody of, and has resided with, the adopting parent or parents for at least two years." *Ibid.*

[7] 8 U.S.C. 1101(b)(1)(D).

who is either a United States citizen or permanent resident alien is not entitled to preferential treatment as a "parent."

2. Appellants are three sets of unwed natural fathers and their illegitimate offspring. In each case the alien father or alien illegitimate child sought an immigration preference by virtue of his relationship to his citizen or resident alien child or parent, but was informed that he was ineligible for an immigrant visa unless he qualified for admission under the general numerical limitations and, in the case of the alien parents, received the requisite labor certification.

a. Appellant Ramon Martin Fiallo is a five year old illegitimate child who is a United States citizen by birth. He currently resides in this country with his mother, a permanent resident alien, and his natural father, appellant Ramon Fiallo-Sone, a citizen of the Dominican Republic who has lived in the United States since his entry in 1964 as a temporary visitor. Although they have never been married, appellant Fiallo's mother and father live together, and his mother provides for the family's financial support while his father acts as his "primary caretaker and constant companion." For unspecified personal reasons appellant Fiallo's parents do not wish to marry (A. 28, 33–36).

In January 1974, appellant Fiallo-Sone submitted a "Preliminary Questionnaire to Determine Immigrant Status" to the United States Consul in the Dominican Republic as a preliminary step for obtaining an im-

migrant visa as the "immediate relative" of his illegitimate son, a United States citizen (A. 47).[8] In response, appellant Fiallo-Sone was informed that unless he legitimated appellant Fiallo by marriage to the child's natural mother, he would be ineligible for th preferential status accorded a "parent" of an American citizen and could obtain an immigrant visa only if he first obtained a labor certification (A. 46).[9]

b. Appellant Cleophus Warner is a naturalized United States citizen and the father of appellant Serge Warner, a sixteen year old illegitimate child. Serge, a citizen of the French West Indies, lived in that country with his mother until 1969, when he

[8] "Immediate relatives," which are defined by Section 201(b) of the Act, 8 U.S.C. 1151(b), to include the children, spouses, and parents of a citizen of the United States, are exempt from the numerical limitations of the Act. In the case of alien parents, however, their citizen child must be at least 21 years of age.

[9] Appellant Fiallo-Sone would only be marginally assisted by his classification as a "parent," within the meaning of Section 101(b)(1)(D) of the Act. Since his citizen child is less than 21 years old, appellant Fiallo-Sone would still not qualify as an "immediate relative" under Section 201(b) and would therefore not be exempt from the applicable numerical limitations. See note 8, *supra*; *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429, 430 (C.A. 2), certiorari denied, 401 U.S. 921; *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179, 1181 (C.A. 5). Furthermore, in view of the recent amendment to Section 212(a)(14), appellant Fiallo-Sone would also be required to satisfy the labor certification requirements unless he could qualify under the savings clause of the new legislation. See note 1, *supra*.

entered the United States as a temporary visitor. During this visit, his mother married another man and requested that Serge remain in the United States with his natural father. Since that time appellant Serge Warner has remained in the United States in the company of appellant Cleophus Warner (A. 31, 36–37).

In 1972, appellant Cleophus Warner petitioned the Immigration and Naturalization Service pursuant to Section 204(a) of the Act, 8 U.S.C. 1154(a), to classify Serge as his immediate relative for purposes of obtaining an immigrant visa exclusive of numerical limitations. The District Director denied the petition because there was no evidence that Serge was appellant Warner's legitimate or legitimated offspring (A. 48).[10]

c. Appellants Trevor and Earl Wilson are permanent resident aliens and the illegitimate children of appellant Arthur Wilson, a citizen of Jamaica. Following their births in 1957 and 1959, respectively, appellants Trevor and Earl Wilson lived with their father until 1968, when they entered the United States with their mother. Thereafter, appellant Arthur Wilson has "maintained a relationship" with his illegitimate children through visits, correspondence, and support contributions (A. 29–30, 39–43).

[10] Appellant Serge Warner is presently paroled into the United States pending exclusion proceedings (A. 37).

Following the death of their mother in 1974, appellants Trevor and Earl Wilson sought to obtain an immigrant visa for their father. Although this petition apparently has not yet been rejected, denial is certain since Trevor and Earl are neither the legitimate nor legitimated children of appellant Arthur Wilson (A. 54). Appellant Wilson presently resides in Jamaica.[11]

3. Appellants instituted this action in July 1974 in the United States District Court for the Eastern District of New York to challenge the constitutionality of Sections 101(b)(1) and 101(b)(2) of the Act, 8 U.S.C. 1101(b)(1) and 1101(b)(2), under the First, Fifth and Ninth Amendments to the United States Constitution. They alleged that the statutory provisions abridged their constitutional right to equal protection of the laws by excluding unwed natural fathers and their illegitimate children from the immigration preferences accorded other "parents" and "children" by the Act and burdened the right of natural fathers and their illegitimate children to mutual association and privacy. Appellants sought to enjoin enforcement of those provisions insofar as the statute operated to

[11] Like appellant Fiallo-Sone, appellant Arthur Wilson would not benefit appreciably if he were considered the "parent" of his sons. Appellant Wilson would not be entitled to immediate relative status because his sons are neither more than 21 years old nor citizens of the United States. Similarly, he would not be relieved from the obligation to obtain a labor certification unless he could qualify under the savings clause. See note 1, *supra*.

exclude them from the immigration preferences granted other "parents" and "children" (A. 11–12).

A three-judge district court, convened pursuant to 28 U.S.C. 2282 (A. 24), granted judgment for the government and dismissed the action (A. 51–73).[12]

[12] As a threshold matter, the court rejected the government's contention that appellants Fiallo and Fiallo-Sone were precluded from challenging the denial by the United States Consul in the Dominican Republic of appellant Fiallo-Sone's petition for a preliminary determination of immigrant status. It has long been a precept of immigration law that the decision of a consular official abroad not to grant a visa is immune from judicial review. See, *e.g.*, *Rivera de Gomes* v. *Kissinger*, 534 F. 2d 518, 519 (C.A. 2), certiorari denied, No. 76–5043, October 18, 1976; *Burrafato* v. *United States Department of State*, 523 F. 2d 554, 556–557 (C.A. 2), certiorari denied, 424 U.S. 910; *Loza-Bedoya* v. *Immigration and Naturalization Service*, 410 F. 2d 343, 347 (C.A. 9); *United States ex rel. Ulrich* v. *Kellogg*, 30 F. 2d 984, 986 (C.A.D.C.), certiorari denied, 279 U.S. 868; *United States ex rel. London* v. *Phelps*, 22 F. 2d 288, 290 (C.C.A. 2), certiorari denied, 276 U.S. 630. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184, n. 3. While acknowledging this authority, the district court noted (A. 55) that "the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular nonreviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa."

In view of the integral role in the visa process played by each preliminary step prior to the formal application (see 1 Gordon and Rosenfield, *Immigration Law and Procedure* §§ 3.7–3.8 (1976)), we find unpersuasive the distinction drawn by the district court. An unfavorable determination by the consular official at the preliminary questionnaire stage is tantamount to the denial of the visa application. Thus, if appellant Fiallo-Sone had formally requested issuance of an immigrant visa, his application would have been refused on precisely the same grounds as those indicated by the consul's letter (A. 46).

222-969—76——3

The court held, with one judge dissenting, that the classifications established by Section 101(b) of the Act were a proper exercise of Congress' plenary power over the admission of aliens and were neither "wholly devoid of any conceivable rational purpose" nor "fundamentally aimed at achieving a goal unrelated to the regulation of immigration" (A. 57). While agreeing with appellants that, in enacting Section 101(b), Congress sought to encourage families to reunify, the court concluded that this goal was not the sole consideration for the legislation and that it did not detract from Congress' extensive authority to determine which types of familial relationships merited the benefit of preferential immigrant status. In the court's view, Congress could rationally exclude aliens whose lives did not "reflect personal standards of conduct important to our society's sense of morality" (A. 56); the provisions excluding aliens claiming to be unmarried natural fathers and their illegitimate children foreclosed an avenue for numerous fraudulent claims that could pose "extremely difficult problems of investigation and proof" (A. 58); and the statutory provisions in issue facilitated the fair administration of the Act as a whole. In sum, the court concluded that the challenged provisions reflected a legitimate policy judgment "which is properly the province of the legislative branch and not the judiciary" (A. 58).

District Judge Weinstein dissented, finding that the statute worked a "blatant * * * discrimination on the basis of gender and legitimacy" (A. 66) and impermissibly burdened the "fundamental, constitutionally protected interests" of "a natural parent, whether father or mother, and a child, whether legitimate or not, * * * in mutual companionship and a life together" (A. 67).

SUMMARY OF ARGUMENT

1. The Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.*, provides the terms and conditions upon which a native of a foreign country may enter the United States. Among the myriad restrictions on immigration included in the Act are the limitations on the number of aliens who may enter the country annually from individual foreign states (8 U.S.C. 1151, 1152) or from independent nations of the Western Hemisphere (8 U.S.C. 1101(a)(27)(A); Section 21(e), Act of October 3, 1965, 79 Stat. 921) and the requirement that aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor must receive a certification from the Secretary of Labor that there are insufficient qualified workers available in this country to perform the intended job and that the alien's employment will not adversely affect the wages and working conditions of American workers (8 U.S.C. 1182(a)(14)).

The immigration system established by the Act is not inflexible, and Congress has frequently created exemptions or allowed discretionary relief from particular provisions when necessary to the achievement of some beneficial goal. In order to maintain and re-

unify families, for example, Congress has provided that an alien who qualifies as the "parent" of a United States citizen or lawful permanent resident may enter this country without satisfying the labor certification requirements of the Act, while an alien who qualifies as the "child" of a United States citizen may be admitted without satisfying the labor certification requirements or numerical limitations. However, Section 101(b) of the Act, 8 U.S.C. 1101(b), does not define the terms "parent" and "child" solely by reference to lineage. Expressly excluded from the statutory definition, and hence denied the immigration preferences available to other categories of close relatives of American citizens and permanent resident aliens, are unwed fathers in relationship to their natural children. The principal issue in this case is whether this exclusion violates principles of equal protection embodied in the Due Process Clause of the Fifth Amendment.

2. For more than a century Congress has enacted legislation governing which aliens may be admitted to the United States and upon what conditions. And for nearly as long this Court has consistently affirmed that the power to admit or exclude foreigners is inherent in national sovereignty and entrusted by the Constitution exclusively to the political branches of government. No different result should obtain under the statute involved here. Section 101(b) is the unambiguous reflection of a long and deep-felt commitment on the part of the legislative and executive branches that not every familial relationship is entitled to preferen-

tial treatment for the purposes of immigration. Embodying as it does a substantive policy regulating the admission of aliens into the United States, the classification scheme of Section 101(b) is not an appropriate subject for judicial review.

The correctness of this conclusion is not altered because a citizen or lawful permanent resident alien asserts a constitutional "right" to familial association or privacy with the excluded foreigner. While the failure to admit an alien for permanent residence or citizenship in this country may impose a hardship upon relatives or others who are lawfully residing here and who may wish to associate with the alien, this Court has not hesitated to sanction such a result when dictated by operation of the immigration laws. Indeed, a contrary result would effectively eliminate the discretion of Congress to decide who among many possible claimants should share this country's bounty. A nonresident alien has no constitutional right to enter the United States, and a citizen or resident alien can assert no greater claim; to hold otherwise would be to deprive the government of its sovereign power to determine which aliens may enter its territory.

Nor is the settled principle of unfettered legislative discretion in immigration matters inapplicable here because Congress did not expressly state that Section 101(b) rests on considerations of foreign policy or national security. As the Court stated in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the con-

duct of foreign relations, the war power, and the maintenance of a republican form of government"—a statement that certainly cannot be doubted in regard to immigration preferences given by one country to the citizens of another.

3. Even if congressional determinations of substantive immigration policy are cognizable in the courts, the constitutionality of Section 101(b)(1)(D) must be sustained since it is a rational response to a legitimate legislative goal. The purpose behind the special immigration preferences granted to specified groups of aliens whose immediate relatives are lawfully residing in the United States was not, as appellants repeatedly but erroneously suggest, a desire to unify all families separated by our national boundaries, regardless of the circumstances of the separation or the resultant hardship to the parties. Rather, Congress sought to encourage families to *reunify* when they became separated by the immigration of a close family member to the United States, and then only under circumstances where it was likely that the separation had occasioned extreme emotional, financial, or social hardship to the family.

Thus, the Act does not grant preferential status to every alien who can prove a close biological relationship with a person lawfully in this country; to the contrary, it contains numerous exceptions which exclude from the definition a variety of persons who might commonly be considered to be a "parent" or "child." For example, preferred immigration treatment is not available to the mothers or fathers of

any child, legitimate or otherwise, who is married or over the age of twenty-one, because Congress reasonably determined that the separation of such family members from their children was unlikely either to be the result solely of the immigration laws or to cause undue harm to the affected parties.[13] Congress also had an ample basis for refusing to accord special immigration preferences to the fathers of children who are neither legitimate nor legitimated. Because such persons are unlikely to have maintained a close personal relationship with their offspring in the foreign country, their admission to the United States would not further the goal of promoting family *reunification* and would not alleviate an unusual hardship suffered as a result of this nation's restrictive immigration laws.

The Act's definitions, of course, were not crafted with mathematical exactness, and some aliens whose entry into this country might well be consistent with the statutory purpose undoubtedly are unable to meet the requirements of Section 101(b). But classifications established by Congress, especially those in an area marked by such wide legislative discretion, do not offend the Constitution merely because in practice they may result in some imprecision or inequality. See *Massachusetts Board of Retirement* v.

[13] Congress, however, has given other preferences in the immigration laws to family members who do not qualify under Section 101(b), in recognition of the fact that they may be more deserving of admission than aliens having no bonds to this country. See 8 U.S.C. 1153.

Murgia, No. 74–1044, decided June 25, 1976, slip op. 9; *Flemming* v. *Nestor,* 363 U.S. 603, 612. Congress need not have granted a preference to any alien, and the definitions of "parent" and "child" operate in the vast majority of cases to admit those whose admission was intended to be facilitated and to exclude those whose admission was thought undeserving. Congress could therefore rationally conclude that the additional benefits that would be derived from a case-by-case adjudication of each alien claiming to be a "parent" or "child" of a United States citizen or permanent resident to determine whether he presented a case of genuine family reunification or extreme hardship was not worth the administrative costs, especially since those costs would principally be borne by our consulates abroad, which have neither the manpower nor the other resources to conduct such individualized inquiries.

Furthermore, by excluding unwed fathers in relation to their illegitimate children from the immigration preference—while providing that such categories of persons may continue to immigrate into the United States under the rules generally applicable to other aliens—Congress acted to minimize the serious potential for immigration fraud. The determination of paternity of an illegitimate is difficult under the best of circumstances; it is all the more difficult when it depends upon events that may have occurred in foreign countries many years earlier. Even if, as appellants speculate, many of these fraudulent visa applications could be detected by diligent investigation, removal by

the judiciary of the statutory bar presently imposed by Section 101(b)(1)(D) could encourage a wave of false applications by aliens who previously had no hope of sharing in our nation's largesse but who may harbor the expectation, however slim, of prevailing at an inquiry. The Constitution does not prohibit immigration classifications that avoid that result.

ARGUMENT

THE EXCLUSION OF AN UNWED FATHER IN RELATION TO HIS ILLEGITIMATE CHILD FROM THE DEFINITIONS OF "CHILD" AND "PARENT" IN SECTIONS 101(b)(1)(D) AND 101(b)(2) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 IS CONSTITUTIONAL

A. THE FORMULATION OF POLICIES REGARDING THE ADMISSION OR EXCLUSION OF ALIENS FROM THE UNITED STATES IS A BASIC CHARACTERISTIC OF SOVEREIGNTY AND IS ENTRUSTED BY THE CONSTITUTION EXCLUSIVELY TO THE POLITICAL BRANCHES OF GOVERNMENT

In adopting the Immigration and Nationality Act of 1952, 66 Stat. 166, as amended, 8 U.S.C. 1101 *et seq.,* Congress acted in accordance with the ancient principle of international law that a sovereign nation has the inherent power to exclude or admit foreigners on such terms and conditions as it may prescribe. See *Kleindienst* v. *Mandel,* 408 U.S. 753, 766.[14] This firmly-established principle, dating from Roman times,[15] re-

[14] See also *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 659; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 596 (Frankfurter, J., concurring); Bar, *International Law* 708, n. 2 (Gillespie ed. 1883).

[15] Borchard, *Diplomatic Protection of Citizens Abroad* 33, 44–48 (1915).

222-969—76——4

ceived recognition during the Constitutional Convention [16] and has continued to be an important postulate in the foreign relations of the United States and the other members of the international community.[17]

Nearly a century ago this Court recognized the power to admit or exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachment—a power to be exercised exclusively by the political branches of government and not to be "granted away or restrained on behalf of any one." *The Chinese Exclusion Case,* 130 U.S. 581, 609. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, 339. Encompassed within Congress' "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration and Naturalization Service,* 387 U.S. 118, 123) is a comparably

[16] See 3 *Papers of James Madison* 1277 (1840), where Madison reports Gouverneur Morris' observation during the debates that "every society, from a great nation down to a club, ha[s] the right of declaring the conditions on which new members should be admitted." Article I, Section 9, Clause 1, of the Constitution itself is an implicit recognition of Congress' authority to regulate immigration. In addition, Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, provided that British and American subjects could freely cross the Canadian border. See *Karnuth* v. *United States*, 279 U.S. 231.

[17] See, *e.g.*, Convention between the United States of America and other American Republics regarding the status of aliens, Article I, 46 Stat. 2753, 2754; Constitution of the Intergovernmental Committee for European Migration, 6 U.S.T. 603, 604 (1955); *Hines* v. *Davidowitz*, 312 U.S. 52.

broad power to "to fix the conditions under which aliens are to be permitted to enter * * * this country." *Flemming* v. *Nestor,* 363 U.S. 603, 616. Whether a particular alien or class of aliens may be allowed to enter the United States is "a matter wholly political in its character" (*Lem Moon Sing* v. *United States,* 158 U.S. 538, 548), "a matter of political outlook and national self-interest" (*Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 596, Frankfurter, J., concurring), and a matter "depend[ent] on the congressional will" (*Shaughnessy* v. *Mezei,* 345 U.S. 206, 216).

Hence, while distinctions drawn by Congress might be constitutionally suspect if embodied in domestic legislation, the courts have held without exception that Congress may employ whatever criteria it deems relevant in determining the status to accord various classes of aliens seeking to enter the United States. See *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 597 (Frankfurter, J., concurring). Aliens may therefore be denied preferential admission, or excluded from this country altogether, on the basis of race (see, *e.g., The Chinese Exclusion Case, supra; Fong Yue Ting* v. *United States,* 149 U.S. 698) or other "immutable" characteristics such as age (*Nazareno* v. *Attorney General,* 512 F. 2d 936 (C.A.D.C.), certiorari denied, 423 U.S. 832) and national origin (*Noel* v. *Chapman,* 508 F. 2d 1023 (C.A. 2), certiorari denied, 423 U.S. 824; *Dunn* v. *Immigration and Naturalization Service,* 499 F. 2d 856 (C.A. 9), certiorari denied, 419 U.S. 1106), or they may be barred because of their sexual proclivities (*Boutilier* v. *Immigration and*

Naturalization Service, supra) or political beliefs (*Kleindienst* v. *Mandel, supra*). Indeed, because the essential characteristic of immigration legislation is the choice of which foreigners may enter the United States and which may not, "every limitation in the immigration laws is to some extent discriminatory. But the authorities tell us that no affected alien can question the reasonableness or fairness of such discriminatory measures." 1 Gordon and Rosenfield, *Immigration Law and Procedure* § 2.2a (1976). And "no successful challenge ever has been made to any exercise of legislative power in this field." *Ibid.*

No alien has any constitutional right to immigrate to the United States. The congressional decision whether or to whom to extend such a valuable privilege, like the decisions whether to extend formal recognition to, enter into a treaty with, or declare war against a foreign country, is not a subject of judicial concern. With respect to the extent of congressional prerogatives over the admission and exclusion of aliens, there is "not merely 'a page of history,' *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349, but a whole volume." *Galvan* v. *Press,* 347 U.S. 522, 531. Throughout, this Court has consistently deferred to the judgment of the legislative and political branches in regard to the type of aliens who should be permitted to enjoy this nation's hospitality.[18] In sum, "that the formulation of [policies

[18] See *The Chinese Exclusion Case*, 130 U.S. 581, 609; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713; *Lem Moon Sing* v. *United States*, 158 U.S. 538; *Wong Wing* v. *United States*, 163 U.S. 228,

pertaining to the entry of aliens and their right to remain in this country] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic

237; *Li Sing* v. *United States*, 180 U.S. 486, 495; *Fok Yung Yo* v. *United States*, 185 U.S. 296, 302; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *United States ex rel. Turner* v. *Williams*, 194 U.S. 279; *United States* v. *Ju Toy*, 198 U.S. 253, 261; *Keller* v. *United States*, 213 U.S. 138, 143–144; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320; *Low Wah Suey* v. *Backus*, 225 U.S. 460, 467–468; *Zakonaite* v. *Wolf*, 226 U.S. 272, 275; *Tiaco* v. *Forbes*, 228 U.S. 549, 556–557; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 40; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Hines* v. *Davidowitz*, 312 U.S. 52; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542–543; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210; *Galvan* v. *Press*, 347 U.S. 522; *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118; *Kleindienst* v. *Mandel*, 408 U.S. 753, 765–770.

Contrary to appellants' contention (Br. 53), this Court's decisions in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, and *United States* v. *Brignoni-Ponce*, 422 U.S. 873, do not represent an inroad upon this consistent recognition of the plenary power of Congress to determine the conditions under which classes of aliens may be admitted into the country. Those cases involve the procedures that the government may undertake, consistent with the Fourth Amendment, to stem the illegal entry of aliens into the United States, not the power of Congress to determine which alien entries are legal and which are not. Indeed, *Almeida-Sanchez* explicitly reaffirmed the undoubted authority of Congress to exclude aliens (413 U.S. at 272), and *Brignoni-Ponce* (citing *Kleindienst* v. *Mandel*, *supra*) noted the "broad congressional power over immigration" but explained that "this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." 422 U.S. at 884.

Similarly, decisions involving the scope of procedural due process that an alien within this country must be accorded, or

as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531.

B. THE EXCLUSION OF ILLEGITIMATE CHILDREN IN RELATION TO THEIR NATURAL FATHERS IS NOT REVIEWABLE BECAUSE SECTION 101(b)(1)(D) REFLECTS AN UNAMBIGUOUS CONGRESSIONAL INTENT TO WITHHOLD SPECIAL IMMIGRATION PREFERENCES FROM APPELLANTS

The principles outlined above are controlling here. The language and legislative history of Section 101(b)(1)(D) demonstrate that the statutory provision represents Congress' deliberate judgment as to the types of aliens who should be accorded immigration benefits. The exclusion of the relationship of natural father and illegitimate child from the preferred status granted many other immediate relatives of American citizens and lawful permanent residents is a clear manifestation of immigration policy. The wisdom of that policy decision is therefore not reviewable in the courts.

As we have already observed (see pp. 6–7 and nn. 3–6, *supra*), the terms "child" and "parent" in the

---

the congressional power to distinguish between citizens and aliens *after* the aliens have lawfully been admitted, are not relevant to a consideration of the fundamental congressional power to determine which aliens among many to admit. Even in these areas, however, this Court has observed that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," *Mathews* v. *Diaz*, No. 73–1046, decided June 1, 1976, slip op. 13, and that exercise of the power is therefore "subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong*, No. 73–1596, decided June 1, 1976, slip op. 12, n. 21.

Immigration and Nationality Act have been carefully drawn to eliminate large groups of persons whom one would normally expect to occupy that status. A "child" must be unmarried and under the age of twenty-one. If a legitimated child or stepchild, the legitimation or marriage creating that status must have occurred before the age of eighteen, and if an adopted child the adoption must have occurred before the age of fourteen. The legitimated and adopted child must also be in the legal custody of his parents and, in the case of an adopted child, he must have lived in their custody for a minimum of two years.[19] Similarly, the term "child" includes "an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child *to its natural mother*." 8 U.S.C. 1101(b)(1)(D) (emphasis added). In light of this unambiguous language, Congress' intention is clear and there can be no doubt about which aliens are entitled to preferential immigration status.

The legislative history of Section 101(b)(1)(D) confirms that this design was deliberate. The precursor of Section 101(b), Section 4(a) of the Immigration Act of 1924, exempted from numerical quota restrictions any "immigrant who [was] the unmarried child under 18 years of age" of a United States citizen. 43 Stat. 153, 155.[20] Although the definition of "child" under the 1924 Act did not expressly distin-

---

[19] The mothers and fathers of children who fail to satisfy these requirements, of course, do not qualify as "parents" under the Act. 8 U.S.C. 1101(b)(2).

[20] The age limit was raised to 21 years in 1932. 47 Stat. 656.

guish between legitimates and illegitimates, the statute was construed to provide non-quota status to alien illegitimate children only if they sought admission to the United States through their citizen mothers. See *Matter of A—*, 5 I. & N. Dec. 272, 273 (B.I.A.), reversed, 5 I. & N. Dec. 283 (A.G.); Kansas, *U.S. Immigration Exclusion and Deportation* 33 (2d ed. 1940).

As originally enacted in 1952, however, Section 101(b) of the Immigration and Nationality Act defined "child" as an unmarried legitimate or legitimated child or stepchild under the age of twenty-one, thus ostensibly excluding the relationship of mother and illegitimate child that had theretofore been accorded preferential status. 66 Stat. 166, 171. In a series of administrative decisions under the 1952 Act, the Attorney General and the Board of Immigration Appeals held that an illegitimate child whose alien mother had since married a United States citizen did not qualify as a "stepchild," *Matter of M—*, 5 I. & N. Dec. 120, 126 (A.G.), that an illegitimate alien child was not eligible for nonquota status based on her relationship to her citizen mother, *Matter of A—*, 5 I. & N. Dec. 272, 283–284 (A.G.), and that the mother of a citizen born out of wedlock did not qualify as a "parent," *Matter of F—*, 7 I. & N. Dec. 448 (B.I.A.).

In response to these decisions and to the Attorney General's recommendation that "the matter should be brought to the attention of Congress," *Matter of A—*, *supra*, 5 I. & N. Dec. at 284, the Act was amended in 1957 to add Section 101(b)(1)(D). This amendment was explicitly designed to "clarify the law so that the

illegitimate child would *in relation to his mother* enjoy the same status under the immigration laws as a legitimate child to remove any doubt of the intent of the original drafters of the act," S. Rep. No. 1057, 85th Cong., 1st Sess. 4 (1957) (emphasis added), and was specifically intended "to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock and *the mothers of such children.*" H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7 (1957) (emphasis added). As explained by Senator Kennedy, a sponsor of the amendment (103 Cong. Rec. 14659 (1957) (emphasis added)):

> [The amendment] would clarify the law so that an illegitimate child would, *in relation to his mother,* enjoy the same status under immigration laws as a legitimate child. It is believed that the drafters of this provision of the act did not intend to deprive an illegitimate child of the status he enjoyed under earlier law * * *.

See also 103 Cong. Rec. 15489 (1957) (remarks of Senator Eastland).[21]

---

[21] The 1957 amendments also changed Section 101(b)(1)(B) of the Act to provide that the statutory definition of the term "child" would include stepchildren "whether or not born out of wedlock." This amendment was passed to reverse the result in *Matter of M—*, *supra*, and to "accomplish the original intent of the section" by "mak[ing] it clear that a child born out of wedlock *in relation to its mother* may be included in the term 'stepchild' and thereby enjoy the same immigration status as other stepchildren." S. Rep. No. 1057, *supra*, at 4 (emphasis added). In addition, the amendments extended preferential status to an adopted child and his parents.

Section 101(b)(1)(D) thus is not, as appellants imply (Br. 52, n. 62), an inadvertent loophole in a statute designed to accomplish family unification regardless of cost. It represents instead an intentional legislative policy choice, against the background of a half-century of experience, of the types of aliens who should be encouraged to enter this country and share our largesse. As such, the congressional decision is not appropriate for judicial review.

Contrary to appellants' contention (Br. 54), no different result is required because citizens or permanent residents of the United States may be injured by the denial of special immigration status to their alien relatives or because the resultant separation would allegedly infringe upon a "constitutionally protected interest in a familial relationship and association in this country" (Br. 19). This much is clear from *Kleindienst* v. *Mandel,* 408 U.S. 753, which concerned the power of the Attorney General to deny discretionary relief to an alien who, as a proponent of "the economic, international, and governmental doctrines of world communism," was ineligible to receive a non-immigrant visa under Section 212(a)(28)(D) of the Act, 8 U.S.C. 1182(a)(28)(D). In that case, plaintiffs, a group of American scholars who had invited Professor Mandel to speak at universities or other forums in the United States or who expected to participate in colloquia with him, conceded that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise" (408 U.S. at 762) and that "Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212(a)(28)(D) and (G)(v)" (*id.* at 767). They contended, however, that since Congress had expressly provided a discretionary waiver procedure, the executive's implementation of that power was limited by the provisions of the Constitution and that their First Amendment rights as citizens had been abridged by the government's refusal to allow them to hear, speak, and debate with Professor Mandel in person. *Ibid.*

This Court disagreed (408 U.S. at 768–769):

> Appellees' First Amendment argument would prove too much. In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular. Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest

against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.

The same rationale underlies the consistent judicial rejection of the analogous "derivative" claim that an alien's exclusion, deportation, or conditional admissibility would impermissibly infringe upon his citizen relative's constitutional right to "familial association." Once Congress has adopted an immigration policy that a particular class of alien may not reside permanently in this country, neither the Due Process Clause nor any other constitutional provision protects a citizen from the "calamity of being separated from family" (*Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 591), and this Court has never indicated otherwise. See, *e.g., Reid* v. *Immigration and Naturalization Service,* 420 U.S. 619 (deportation of alien parents of two citizen children); *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72 (deportation of alien parents of citizen child); *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537 (exclusion of alien wife of citizen).[22] Familial relationships with an

[22] See also *Burrafato* v. *United States Department of State*, 523 F. 2d 554, 555 (C.A. 2), certiorari denied, 424 U.S. 910; *Cervantes* v. *Immigration and Naturalization Service*, 510 F. 2d 89, 91 (C.A. 10); *Noel* v. *Chapman*, 508 F. 2d 1023, 1027–1028 (C.A. 2), certiorari denied, 423 U.S. 824; *Robles* v. *Immigration and Naturalization Service*, 485 F. 2d 100, 102 (C.A. 10); *Aalund* v. *Marshall*, 461 F. 2d 710, 714 (C.A. 5); *Silverman* v. *Rogers*, 437 F. 2d 102, 107 (C.A. 1), certiorari denied, 402 U.S. 983; *Faustino* v. *Immigration and Naturalization Service*, 432 F. 2d 429 (C.A. 2), certiorari denied, 401 U.S. 921; *Perdido* v. *Immigration and Naturalization Service*, 420 F. 2d 1179, 1181 (C.A. 5); *Mendez* v. *Major*, 340 F. 2d 128, 131–132 (C.A. 8); *Swartz* v. *Rogers*, 254 F. 2d 338, 339 (C.A.D.C.), certiorari denied, 357 U.S. 928.

alien may be pursued, but not within the United States unless the usual criteria for immigration are met."[23]

Indeed, recognition of a constitutional right to "family unity" on the part of an American citizen or lawful permanent resident that would outweigh the country's prerogatives as a sovereign to refuse admission to any or all aliens would effectively surrender congressional control over immigration. Appellant's Ninth Amendment claims cannot be limited to relations between a father and his illegitimate child: a holding that Section 101(b)(1)(D) is invalid would call into question the constitutionality of the numerous other restrictions imposed by the Act upon the entry of immediate relatives of United States citizens. And once those obstacles to immigration had been cleared, individual citizens would in effect have the power to grant preferences merely by claiming, legitimately or otherwise, that refusing entry to a partic-

[23] Although appellants argue that "the statutory barrier to the unification of the parent and child in this country will often force the United States citizen or permanent resident child or citizen father to depart from this country" (Br. 21), this decision is little different from the choice made by that person to leave his relatives in his native land and to depart for the United States. For example, appellants Trevor and Earl Wilson separated from their father in 1968 when they entered the United States with their mother (A. 39, 41), and appellant Cleophus Warner voluntarily left his son in the French West Indies when he departed for the United States (A. 36). The "calamity of being separated from family," therefore, cannot be attributed exclusively to the Act.

ular alien would violate a constitutionally-protected right of familial association. The obvious consequence would be that, absent a constitutional amendment, Congress would be powerless to implement a basic power of every independent nation state—to decree that certain aliens may not enter, much less reside in, its territory or that they may enter only if they meet certain conditions. The Constitution does not mandate that result.

Nonresident aliens, therefore, have no constitutional right to make their home in the United States, and the citizenship of a relative imparts no greater right to overturn this country's decisions regarding immigration policy. As the Court held long ago, the authority of Congress to determine which aliens may be admitted and upon what conditions

> cannot be granted away or restrained on behalf of any one. The powers * * * are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.

The Chinese Exclusion Case, supra, 130 U.S. at 609. While a citizen or lawful permanent resident may have a privilege, protected by the Constitution, to associate freely with anyone lawfully in this country, he may not require that the immigration policy of the United States be molded to permit the entry of an alien whose preferential admission Congress has chosen not to allow.

Appellants suggest (Br. 54), however, that there should be no judicial deference to the immigration policy decisions of the political branches here because the provisions of Section 101(b)(1)(D) do not on their face implicate "considerations of foreign policy, national security, or threats to the general welfare of this country * * *." Few sections of the immigration laws expressly indicate that such considerations led to or underlie their enactment. Nevertheless, the Court's observation in *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 588–589, pertains: "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." See also *Hampton* v. *Mow Sun Wong, supra,* slip op. 15–16. This nation's immigration statutes constitute an important part of its formal relations with other countries: they express the terms and conditions under which natives of those countries may visit temporarily, permanently reside in, or become citizens of the United States. Particularly in the area of special immigration preferences, each provision of the Act serves as a lever for negotiating reciprocal immigration privileges with other nations. Each provision of the Act is an integral part of the whole; no portion may appropriately be viewed in isolation; each represents a political judgment in the context of the entire Act. These policies should be changed, if at all, only through international diplomacy or new legislation.

In sum, this case touches at the heart of Congress' heretofore unquestioned authority over the admission

of aliens. There is nothing in the Ninth Amendment that requires a departure from the constitutional principle, laid down by this Court and affirmed many times for nearly one hundred years, that Congress has the exclusive power to determine which aliens are to be welcomed and that these are matters "wholly outside the concern and the competence of the Judiciary." *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 596 (Frankfurter, J., concurring). The right to "familial association" does not carry with it the right to bring an alien into this country in ways not sanctioned by statute.

C. EVEN IF IMMIGRATION POLICY DETERMINATIONS BY THE LEGISLATIVE AND EXECUTIVE BRANCHES MAY BE REVIEWED IN THE COURTS, SECTION 101(b) MUST BE UPHELD BECAUSE IT HAS A RATIONAL BASIS AND FURTHERS VALID OBJECTIVES OF THE IMMIGRATION LAWS

Ignoring a century of constitutional history, appellants contend that the courts are free to examine the legitimacy of the policy decisions underlying Section 101(b)(1)(D) and that, when viewed in light of the standards developed for judging the validity of domestic legislation, the provision must be found to violate principles of equal protection embodied in the Due Process Clause of the Fifth Amendment. We have already indicated that the fundamental premise of appellants' argument is incorrect and that the power of Congress to legislate in the area of immigration is plenary. But even if the Court were to depart from its past rulings on the appropriate scope of judicial review of political decisions concerning the admission

of aliens, the constitutionality of Section 101(b)(1)(D) must be sustained.[24] The statutory provision is rationally related to achievement of the legislative purpose behind the special immigration preferences granted to many categories of close relatives of United States citizens and lawful permanent residents—"to keep together the family unit wherever possible" (H.R. Rep. No. 1199, *supra,* at 8)—and furthers the unquestionably legitimate goals of facilitating administrative determinations of admissibility and avoiding spurious claims.[25]

The basis of appellants' argument—and in our view its fatal flaw—is the assertion that the "exclusive Congressional purpose" (Br. 36) behind the

---

[24] Because every decision by the federal government affecting aliens is distinctly political in character (*Hampton* v. *Mow Sun Wong, supra,* slip op. 12, n. 21), and because there is no domestic counterpart to the power of Congress to exclude, regulate, or deport aliens (*Mathews* v. *Diaz, supra,* slip op. 12), this Court has recognized that even legislation concerning the rights of aliens lawfully in this country is "subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong, supra,* slip op. 12, n. 21. *A fortiori,* distinctions drawn by Congress among aliens outside the United States, if reviewable at all, deserve even greater deference.

[25] Distinctions that do not implicate fundamental constitutional interests or rest upon suspect classifications do not violate principles of equal protection embodied in the Due Process Clause unless they are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger* v. *Salfi,* 422 U.S. 749, 768, quoting from *Flemming* v. *Nestor,* 363 U.S. 603, 611. See also *Mathews* v. *Lucas,* No. 75-88, decided June 29, 1976; *Richardson* v. *Belcher,* 404 U.S. 78, 81–84. Appellants do not contend that aliens have a constitutional right to enter the United States, and this Court has never held that sex (*Kahn* v. *Shevin,* 416 U.S. 351, 355, or illegitimacy (*Mathews* v. *Lucas, supra,* slip op. 10–11) is a suspect classification.

enactment of the special immigration preference provisions was the unification of families, regardless of the strength of the previous bonds between family members, the reason for their separation, or the harm occasioned by their living apart.[26] This assertion flies in the teeth of the carefully drawn definitions of "parent" and "child" in the Act, whose numerous exceptions exclude from the statutory terms a large number of persons generally considered to be members of a nuclear family (see pp. 24–25, *supra*), and the repeated references in the legislative history to the *reunification* of a previously-existing family unit.

As appellants' citations to the congressional reports and debates indicate (Br. 32–33) (emphasis added), the statute was expressly aimed at "the *preservation* of the family unit" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952)) and at "*keeping* families of United States citizens and immigrants *united*" (H.R. Rep. No. 1199, *supra,* at 7). The overriding purpose was "to *reunite* families" (103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore)), especially those which "have been separated *because of the workings of our immigration law*" (103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy)), and "to *remove the personal tragedy* of the split and separated families" (103 Cong. Rec. 16307 (remarks of Representative Rodino)). See also *Immigration and Naturalization Service* v. *Errico,* 385 U.S. 214, 219–220 and n. 9.

[26] See, *e.g.*, Br. 21, 24, n. 17, 36, 37, 55, n. 64.

Congress' purpose, therefore, was not to facilitate the admission of an alien into this country because of the mere fortuity that his relative was already living here; rather, it was to grant special relief in cases of exceptional hardship to parents or children of American citizens or permanent residents who had once lived with their family and whose continued separation was the result not of choice but of the restrictive immigration provisions of the Act. Hence, children, legitimate or not, who are married or over the age of twenty-one cannot qualify for the immigration preference because Congress reasonably determined that married or adult offspring do not normally reside with their parents and that the separation of such individuals from their mothers or fathers was therefore unlikely either to create an undue hardship requiring special dispensations or to have been caused by the restrictions of the Act. 8 U.S.C. 1101(b)(1)(A). By the same token, legitimated children are not entitled to preferential immigration status unless their legitimation occurred prior to their eighteenth birthday and at a time when they were in the legal custody of the legitimating parent or parents (8 U.S.C. 1101(b)(1)(C)); adopted children must have been adopted before the age of 14 and must have lived in the custody of their adopting parent or parents for at least two years (8 U.S.C. 1101(b)(1)(E)); and stepchildren must not have reached the age of

eighteen at the time the marriage creating the status of stepchild occurred (8 U.S.C. 1101(b)(1)(B)).[27]

In each of these situations, Congress reasonably concluded that, regardless of the existence of a *bona fide* parent-child relationship, the separation of the family members under circumstances not satisfying the statutory conditions would not be unusually harsh or inequitable and that the immigration of the alien child or parent would not bring about the family *reunification* contemplated by Section 101(b).[28]

The definition of "child" in Section 101(b)(1)(D) is fully consistent with this statutory scheme. Congress could rationally determine that limitation of the special immigration benefits to the relationship of natural mother and illegitimate child, and denial of preferential status to the relationship of natural father and illegitimate child, would advance the goal of *reuniting* family members who would be living together but for the restrictions of the Act, while eliminating a large category of persons whose admis-

[27] These qualifications—like those in Section 101(b)(1)(D)—also prevent immigration fraud, as we develop below (see pp. 44–45, *infra*).

[28] Contrary to appellants' assertion (Br. 35–36), there is no anomaly in allowing the wife of the natural father of an illegitimate child to qualify as the child's "stepparent" under Sections 101(b)(1)(B) and 101(b)(2). The Attorney General has construed the statute to require proof that the alien stepchild would join an established family unit in this country. See *Matter of Stultz*, Interim Decision #2401, decided June 30, 1975 (A.G.); *Matter of Amado and Monteiro*, 13 I. & N. Dec. 179 (B.I.A.); *Matter of Soares*, 12 I. & N. Dec. 653 (B.I.A.).

sion to this country would do nothing to further that result. A natural mother has, by definition, once been united with her illegitimate child, and both reason and common experience suggest that that close relationship has continued in the vast majority of cases. No such intimacy generally exists between natural fathers and their illegitimate children, especially those fathers who have never chosen to legitimate their son or daughter.[29] Indeed, it is significant

[29] As the dissenting opinion below notes (A. 70–71), even studies favorable to appellants conclude that more than 86 percent of all illegitimate children who live with one of their parents reside with their mother. In this case, for example, although appellant Arthur Wilson lived with his illegitimate children—and their mother—for a number of years after their births, he has not lived with them for the last eight years (A. 43). Similarly, although appellant Cleophus Warner presently resides with his son, he apparently did not do so during the first nine years of the boy's life (A. 36–37). Moreover, the district court correctly noted the havoc that could be played with our immigration laws—in clear contravention of the legislative decision to limit special immigration status to those having a prior close familial relationship—if appellant's claims were to prevail (A. 59, n. 15):

"[A]n unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over *all* of the children he has ever fathered * * *."

Appellants rely upon a mass of social science literature (Br. 26–28 and nn. 18, 19, 20, 21) in an effort to demonstrate the changing mores of parents of illegitimate children and the increasingly important role of the illegitimate father in child-rearing. Although we decline to engage appellants in a sociological debate over the proper conclusions to be drawn from these studies, we note that they relate exclusively to patterns of out-of-wedlock pregnancies in this country, rather than in the foreign countries with which Section 101(b) is concerned. The Depart-

that this obvious distinction between fathers and mothers has been a feature of our immigration and naturalization law since the First Congress. 1 Stat. 103. See *Rogers* v. *Bellei*, 401 U.S. 815, 823.

Faced with the alternatives of over-inclusiveness—opening the doors of this country to everyone who claims a biological relationship to a child or parent who is a citizen or lawful permanent resident of the United States, regardless of the strength of the bonds that previously existed between them—or under-inclusiveness—limiting the special immigration status to those persons whose admission is most likely to further the goal of family reunification and who are most likely to have suffered the harm that the provisions of Section 101(b) were designed to alleviate—the legislative and executive branches rationally determined that a conclusive, though imprecise, rule was the better course. This statutory classification represents a "reasonable empirical judgment[ ]" (*Mathews* v. *Lucas*, No. 75–88, decided June 29, 1976, slip op. 15) that the number of putative fathers who had not legitimated their illegitimate children [30] but

ment of State has estimated, for example, that 80 percent of all children born in Jamaica are illegitimate and that in only 5 percent of those cases is the child supported and cared for by his natural father. Letter from Leonard F. Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State, to Representative Joshua Eilberg, Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, House of Representatives, pp. 2–3. A copy of this letter is being lodged with the Clerk of this Court and is being furnished to counsel for appellants.

[30] Legitimation, of course, would conclusively establish the familial unity that legitimacy normally demonstrates and that

who could make the requisite showing of a formal, pre-existing familial relationship was insufficiently large to justify adoption of a method of case-by-case adjudication that a contrary definition would have required.

it was the Act's intent not to disrupt. See 8 U.S.C. 1101(b)(1)(C). Although appellants contend that legitimation often will be difficult or impossible, we fail to comprehend why this should be so in the vast majority of cases. Appellant Fiallo-Sone, for example, gives no reason for his refusal to marry his son's mother (A. 54), while appellant Arthur Wilson does not explain why he could not marry Leonie Moses during the 11 years he lived with her and their children (A. 42–43). Moreover, legitimation may occur under the law of either the father's or the child's domicile or residence (8 U.S.C. 101(b)(1)(C)) and at least 19 States allow a putative father to legitimate his offspring even when the natural mother is married or deceased. See Ala. Code, title 27, § 11 (Cum. Supp. 1973) (written declaration of paternity); Alaska Stat. § 25.20.050 (1975) (written acknowledgment or court adjudication of paternity); Ariz. Rev. Stat. Ann. § 8–601 (Cum. Supp. 1975) (every child legitimate child of natural parents); Cal. Civil Code § 7001, *et seq.* (West, Cum. Supp. 1976) (every child legitimate child of natural parents), Del. Code Ann., title 13 § 1301 (1975) (written acknowledgment of paternity); Ind. Stat. Ann. § 29–1–2–7(b)(1) (1972) (establishment of paternity during father's lifetime); La. Rev. Stat. Ann. § 9:391 (Cum. Supp. 1976) (written declaration of paternity); Me. Rev. Stat. Ann., title 18 § 1003 (1965) (written acknowledgment or court adjudication of paternity); Mich. Stat. Ann. § 27.3178(153) (Cum. Supp. 1976) (written acknowledgment of paternity); Miss. Code Ann. § 93–17–1 (1972) (court adjudication); N.C. Gen. Stat. § 49–10 (Cum. Supp. 1975) (petitioning court by putative father); N.D. Cent. Code § 14–17–01 *et seq.* (Cum. Supp. 1975) (every child legitimate child of natural parents); Ohio Rev. Code Ann. § 2105.18 (Cum. Supp. 1975) (application by putative father to court); 10 Okla. Stat. Ann. § 55 (1966) (acknowledgment of paternity); S.C. Code § 15–1384 (1962) (petitioning court by putative father); S.D. Comp. Laws § 25–6–1 (1969) (public acknowledgment of paternity and receipt of child into family); Tenn. Code Ann. § 36–302 (Cum. Supp. 1975) (petitioning court);

Weinberger v. *Salfi*, 422 U.S. 749, supports the validity of the congressional decision. There, the Court was faced with a duration-of-relationship requirement in the Social Security Act which defined "widow" so as to exclude a surviving wife from death benefits if her marriage did not precede the wage-earner's death by at least nine months. The eligibility test was conclusive, raising an "irrebutable presumption" that any marriage entered into within the statutory period was for the purpose of obtaining survivor's benefits. Despite the fact that the legislation "swe[pt] more broadly than the evils with which [it was designed] to deal" (*id.* at 784), the Court upheld its constitutionality, finding that "Congress, its concern having reasonably been aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Id.* at 777.

The criterion applied by the Court in *Salfi* was not whether the "statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute" (*ibid.*), but whether the objective standards established by the statute "bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility" (*id.* at 772). As the Court explained last Term in *Mathews* v. *Lucas*, *supra*, slip op. 13–14, which sustained a legislative presumption similar to that in issue here:

> Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

Section 101(b) unquestionably meets this test, for, as we have already explained, each of the statutory definitions of "parent" and "child" has been carefully drafted to carve out a specific class of aliens reasonably thought to be most likely to suffer the hardships brought about by the separation of a close family unit and, hence, to be most deserving of special immigration status.[31]

Tex. Fam. Code Ann. § 13.01 (1975) (petitioning court by putative father within one year of illegitimate birth); Utah Code Ann. § 78–30–12 (1953) (acknowledgment of paternity and receipt of child into family).

[31] As *Salfi* demonstrates (see also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 377), appellants' assertion that conclusive presumptions invariably violate due process is incorrect. Each statutory presumption in the cases on which appellants rely (Br. 23–24) was invalidated because the Court found that it was not rationally related to the asserted legislative purpose and that it rested on judgments that were often contrary to fact. See *Turner* v. *Department of Employment Security*, 423 U.S. 44, 46; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648–653; *Jimenez* v. *Weinberger*, 417 U.S. 628, 636; *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 643, 646; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 538; *United States Depart-*

Indeed, the considerations underlying the adoption of the "bright-line" test of Section 101(b)(1)(D) are stronger than in *Salfi* or *Lucas,* because of the far greater incentives and opportunities for fraud in the area of immigration—a problem that has been characterized as "rampant." [32] Determinations of paternity are inherently difficult under the best of circumstances (see *Gomez* v. *Perez,* 409 U.S. 535, 538), but they are even more so when the child has been born, perhaps many years earlier, in a foreign country.[33] Unlike the identity of the mother, which will often appear on the

ment of Agriculture v. *Murry,* 413 U.S. 508, 514; *Vlandis* v. *Kline,* 412 U.S. 441, 452; *Stanley* v. *Illinois,* 405 U.S. 645, 656–657. In addition, several of these challenged statutory classifications involved constitutionally protected interests, which require a stronger showing of mathematical accuracy in the presumption.

Moreover, unlike *Jimenez,* Section 101(b) "does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Mathews* v. *Lucas, supra,* slip op. 17. Large categories of legitimate children also are deprived of making an individualized showing of previous, close family association, because Congress reasonably determined that the percentage of legitimate aliens in the excluded categories, like the percentage of illegitimate aliens, who could make the requisite showing was too small to incur the added inconvenience, expense, and fraudulent claims that would arise from case-by-case determinations.

[32] Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States,* 13 San Diego L. Rev. 34, 35–36 (1975). The principal methods of immigration fraud include the use of false or altered documents and sham marriages, and the major sources of the illegal alien flow are underdeveloped countries with high—and largely illegitimate—birth rates. *Ibid.*

[33] See Hearings on H.R. 10993 before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 94th Cong., 2d Sess. 6 (July 28, 1976).

birth certificate and which frequently can be corroborated by the testimony of relatives, midwives, or medical personnel, the sole evidence that a man has fathered a particular child is often the testimony of the mother, and she may not know. Indeed, two or more men may claim paternity of the same child.

It is no answer to these significant difficulties to suggest, as appellants do (Br. 42–44), that the government may detect instances of fraud through more thorough investigative techniques. Even if increased diligence could ferret out false applications—which we doubt—appellants' solution would impose "a substantial burden on the system," *Nazareno* v. *Attorney General, supra,* 512 F. 2d at 940, and that burden would fall primarily on United States consular officials overseas, who have neither the financial resources or manpower to do the job nor the authority to elicit all relevant information from foreign agencies. Furthermore, the mere hope of prevailing at an inquiry would encourage the filing of bogus petitions that the present statutory bar to eligibility avoids. Such time consuming procedures would inevitably delay issuance of immigration visas to those aliens who are unquestionably qualified under the Act. As the Court concluded in *Salfi* (422 U.S. at 781):

> While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course.

While in a particular case the provisions of Section 101(b) might appear to operate inequitably, Congress acted reasonably when it decided that the price to be paid to avoid these inequities would be prohibitive and might lead to far more serious unfairness. Any system of immigration law that prevents free entry into this country from abroad necessarily imposes hardship on those who seek but who are denied admission. As appellants concede (Br. 38), however, neither illegitimacy nor parentage of illegitimate children is an excludable characteristic under the Act. Appellants therefore remain free to request immigrant visas under the rules that most other aliens must satisfy. Indeed, in recognition that certain aliens may not be eligible for special immigration status but may nonetheless have a greater claim to enter the United States than other aliens, Congress has granted preferences in the receipt of visas subject to numerical limitations to relatives of United States citizens or lawful permanent residents who do not fall within Section 101(b). See Section 203(a) of the Act, 8 U.S.C. 1153(a); 1 Gordon and Rosenfield, *supra,* at § 2.27.[34]

[34] If appellants' plight requires further assistance, relief may be sought either through private legislation or an amendment to the Act. In this regard, we note that a bill (H.R. 10993) introduced in the 94th Congress would have placed natural mothers, natural fathers, and illegitimates claiming preferential immigration status by virtue of their relationship to either parent on an equal plane under Section 101(b). At hearings held in July 1976, representatives of the Department of State and the Department of Justice stated that the Executive Branch did not object to the proposal in principle but believed strongly that the bill should be amended to include adequate safeguards to reduce the substantial possibility of fraud. Hearings on H.R. 10993, *supra*, at 7–9, 37. The history of Section 101(b), beginning with its initial restrictive provisions in 1952, its liberalization in 1957, and the more recent attempts at further liberalization—each in response to a particular problem and with due regard to the difficulties that might ensue from the change—demonstrates that any expansion of the definitions of "parent" and "child" should occur through the legislative process and that Congress should be allowed to proceed deliberately. See *Geduldig* v. *Aiello*, 417 U.S. 484, 495.

In any event, the ultimate decision regarding which aliens should be admitted to the United States is a political one. Congress need not have allowed the admission of, much less granted an immigration preference to, any aliens; the classifications it instead adopted in Section 101(b)(1)(D) are rationally related to the accomplishment of a legitimate immigration purpose and do not offend the Due Process Clause.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
KENNETH S. GELLER,
Assistant to the Solicitor General.
SIDNEY M. GLAZER,
ROBERT J. ERICKSON,
Attorneys.

NOVEMBER 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976